

Office of Chief Counsel
Internal Revenue Service

memorandum

CC:LM:MCT:CLE:PIT:POSTF-158728-01
MAYost

date: November 9, 2001

to: Thomas Taylor, Team Coordinator, LMSB:HMT:1673

from: Associate Area Counsel, LM:HMT:CLE:PIT

subject: Extension of Statute of Limitations

U.I.L. No. 6501.08-10

This memorandum responds to your request for assistance dated October 22, 2001. The advice rendered in this memorandum is conditioned on the accuracy of the facts provided by you. This memorandum should not be cited as precedent. It is also subject to 10-day post review in the National Office and, therefore, may be modified.

ISSUE

Can a consent to extend the statute of limitations be secured for [REDACTED], a Barbados company which was dissolved under that country's law on [REDACTED]? If so, who can sign the consent?

CONCLUSIONS

A consent can be obtained from [REDACTED] (hereinafter [REDACTED]). The consent must be obtained prior to [REDACTED], when a two-year winding up period provided under Barbados law will expire. The consent should be signed by an official of [REDACTED] who possesses authority to act for that corporation under Barbados law. One such person would appear to be [REDACTED], the director who filed the articles of dissolution for [REDACTED]. It is not sufficient to have an officer of the former parent, [REDACTED], sign the consent.

It should be noted, however, that a consent for [REDACTED] will have limited practical significance after [REDACTED], when the company will cease to exist for all purposes, pursuant to Barbados law. The only benefit to securing a consent from [REDACTED] would be to extend the statute of limitations against any third parties that may be liable as transferees. A

consent extending the statute of limitations on assessment for a taxpayer also extends the statute of limitations for transferees.

In this vein, we recommend that you also secure at the present time a consent on Form 977 and a transferee agreement on Form 2045 from [REDACTED] to protect the statute of limitations on any potential transferee liability that it may have incurred as the sole shareholder of [REDACTED].

FACTS

[REDACTED] was incorporated in Barbados as a foreign sales corporation on [REDACTED]. The company was a wholly-owned subsidiary of [REDACTED], which was subsequently acquired by [REDACTED]. Starting with the fiscal year ended [REDACTED], [REDACTED] elected to be part of [REDACTED]'s consolidated return.

Exam has initiated an audit of [REDACTED] and its subsidiaries for the fiscal years ended [REDACTED], [REDACTED], and [REDACTED]. [REDACTED] is not currently under audit, but the Exam team wants to secure a waiver to protect the statute of limitations on [REDACTED]'s tax return for [REDACTED], which was the last year that the company was active. For [REDACTED], [REDACTED] reported total foreign trading gross receipts of \$ [REDACTED] and a tax liability of \$ [REDACTED]. The corporate balance sheet showed total assets of only \$ [REDACTED]. [REDACTED] filed a form 1120 FSC return for [REDACTED] showing no activity. A final return was filed for the period [REDACTED] to [REDACTED] which reported no activity and total assets of only \$ [REDACTED].

A form 966, Corporate Dissolution or Liquidation, was filed on behalf of [REDACTED] as of [REDACTED]. Attached to the Form 966 was a resolution, dated [REDACTED], by [REDACTED], as the sole shareholder of [REDACTED], stating that the [REDACTED] intended to dissolve [REDACTED] pursuant to section 364 of the Companies Act Cap. 308 of the Laws of Barbados. A director of [REDACTED] was authorized and directed to execute Articles of Dissolution for filing with the Registrar of Companies in Barbados. In accord with the corporate resolution of [REDACTED], [REDACTED], a director of [REDACTED], filed Articles of Dissolution on [REDACTED] and indicated that the company had no property and no liabilities. On the same day, the Registrar of Companies of Barbados issued a Certificate of Dissolution for [REDACTED].

LAW AND ANALYSIS

A foreign sales corporation (FSC) is, by definition, a corporation organized pursuant to the laws of a qualified foreign country or U.S. possession. I.R.C. § 922(a)(1)(A). Because a FSC is organized under the laws of a foreign country or a U.S. possession, it cannot be part of its U.S. parent's consolidated group. I.R.C. §§ 922(a)(1)(A); 1504(a)(1), (b)(3). Thus, it is not appropriate to obtain a consent to extend the period of limitations for assessment with respect to a FSC from the U.S. parent. Rather, a consent should be solicited directly from the FSC and signed by a corporate official authorized to act on behalf of the FSC. Generally, the corporate existence of a FSC is respected for U.S. tax purposes, including periods of limitation. See generally, Union Carbide Corp. v. Commissioner 110 T.C. 375 (1998).

The continuing existence of a dissolved corporation and the legal possibility of executing a consent to extend the statute of limitations on assessment for such corporation depends upon the law of the place of its incorporation. See, United States v. Krueger, 121 F.2d 842, 845 (3rd Cir.), cert. denied, 314 U.S. 677 (1941). In the instant case, the law of Barbados applies.

Under § 364 of the Companies Act Cap. 308 of the Laws of Barbados (hereinafter "Companies Act"), a company that has no property and no liabilities may be dissolved by special resolution of its shareholders. Such a resolution was adopted by [REDACTED] as sole shareholder of [REDACTED]. In accord with the shareholder resolution, [REDACTED], a director of [REDACTED], filed articles of dissolution with the Registrar of Barbados, pursuant to § 365(1) of the Companies Act. The Registrar was thereupon required to issue a certificate of dissolution by § 365(2) of the Companies Act, and a certificate of dissolution was duly issued on [REDACTED]. Under § 365(3) of the Companies Act, a company ceases to exist upon issuance of a certificate of dissolution. Thus, [REDACTED] ceased to exist as of [REDACTED].

However, under § 384(2)(b) of the Companies Act, a civil, criminal, or administrative action or proceeding may be brought against a company within two years after its dissolution, as if the company had not been dissolved. Accordingly, there is a two-year winding up period following dissolution during which an action may be brought against a dissolved company. This two-year period is set to expire with respect to [REDACTED] on [REDACTED]. A consent to extend the statute of limitations may be solicited from [REDACTED] during this period. Cf., Associates Investment, Co. v. Commissioner, 59 T.C.

441 (1972) (A consent was held to be valid under Nebraska law which provided for a similar post-dissolution period for bringing an action against a dissolved corporation); Badger Materials, Inc. v. Commissioner, 40 T.C. 1061 (1963) (similar holding under Wisconsin law.) Thus, any consent from [REDACTED] should be obtained prior to [REDACTED], when the two-year, winding-up period provided under Barbados law expires. The consent should be signed by an officer of [REDACTED] who possesses authority to act for the corporation. One such person would appear to be [REDACTED], the director who filed the articles of dissolution for [REDACTED]. Under § 2 of the Companies Act, an "officer" of a Barbados company includes, among others, the managing director, general manager, comptroller, secretary, or treasurer.

Although a consent may still be obtained from [REDACTED], such consent would have no practical legal effect after [REDACTED], when the company will cease to exist for all purposes. A consent will not initiate a civil, criminal or administrative proceeding which would extend the corporate existence of the company. Cf., Badger Materials, Inc. v. Commissioner, 40 T.C. 1061, 1063 (1963); Wheeler's Peachtree Pharmacy v. Commissioner, 35 T.C. 177 (1960), acq., 1961-2 C.B. 5; Ross v. Venezuelan-American Independent Oil Producers Ass'n, Inc., 230 F. Supp. 701, 702 (D. Del. 1964); Field v. Commissioner, 32 T.C. 187 (1959), aff'd per curiam, 286 F.2d 960 (6th Cir. 1960), cert. denied, 366 U.S. 949 (1961).

Thus, as of [REDACTED], even if a consent is obtained, the corporate existence of [REDACTED] will terminate, along with the authority of all of its officers and directors. This means that after that date an agreement to assess any audit deficiency could not be secured, nor would there be a corporate entity against which collection action could be taken.

For these reasons, we also recommend that you secure a consent on Form 977 and a transferee agreement on Form 2045 from [REDACTED] to protect the statute of limitations on any potential transferee liability that the latter may have incurred as the sole shareholder of [REDACTED]. The potential liability of [REDACTED] as a transferee depends upon several factors, including whether there was a tax liability owed by [REDACTED] for the tax year [REDACTED], and whether [REDACTED] received any liquidating distributions from [REDACTED] which rendered it insolvent. After audit, if you determine that there is a potential transferee liability against [REDACTED] or any other entity, we will be available to discuss this matter further.

This writing may contain privileged information. Any unauthorized disclosure of this writing may have an adverse effect on privileges, such as the attorney client privilege. If disclosure becomes necessary, please contact this office for our views.

If you have any questions, please call Attorney Michael A. Yost, Jr. at (412) 644-3441.

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By: _____
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